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REX MICHAEL KERN Jr.

UNITED STATES DISTRICT COURT  
IN AND FOR THE EASTERN DISTRICT OF WASHINGTON  
RICHLAND, WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REX MICHAEL KERN Jr.,

Defendant.

Case No.4:22-CR-6038-MKD-1

MOTION AND MEMORANDUM RE:  
SUPPRESSION OF EVIDENCE

Note: July 27, 2023, at 1:30pm  
Judge Dimke at Richland

Evidentiary Hearing Requested

COMES NOW the Defendant, REX MICHAEL KERN Jr., and moves this Court for an Order suppressing the evidence seized in this matter. This motion is based on the attached Memorandum of Law filed in support of this motion. Specifically, the defendant moves to suppress evidence seized from his vehicles on February 11, 2022, and July 21, 2022.

I. Facts

Mr. Kern is charged by Indictment with three counts of Possession with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. §841(a)(1)(b)(1)(B)(viii); and two counts of Felon in Possession of a Firearm in

1 violation of 21 U.S.C §922(g)(1) and 924(a)(2)841(a)(2); 924(a)(8). He is also  
2 charged with one count Possession of Firearms in Furtherance of Drug Trafficking  
3 in violation of 18 U.S.C. §924(c)(1)(A).  
4

5 A copy of the report regarding the search of the vehicles is attached as Exhibit  
6 A. A copy of the Affidavits in support of the request for a search warrant for the  
7 vehicles is attached hereto as Exhibit B.  
8

9 On February 11, 2022, at 3:00 am, Officer Watson of the Walla Walla Police  
10 Department observed a white Hyundai at a stop sign in Walla Walla. The vehicle  
11 caught the attention of the officer as it was stopped at the stop sign. As the officer  
12 pulled up to the intersection, the Hyundai then proceeded to pass through the  
13 intersection. The officer then requested a run of the license plate. The vehicle  
14 came back as stolen, and the officer then proceeded to pull the vehicle over.  
15

16 The driver of the vehicle was Mr. Kern. Officers arrived and they requested  
17 that Mr. Kern exit the vehicle. After Mr. Kern exited the vehicle, the officers placed  
18 him in handcuffs. Once the officers recognized Mr. Kern and knew him, he was  
19 searched and officers removed several keys from his person. Mr. Kern advised the  
20 officers that he had purchased the vehicle. Mr. Kern was then placed under arrest  
21 for possession of a stolen vehicle. After placing Mr. Kern in the police vehicle, the  
22 officers then searched the Hyundai to secure it. The Hyundai was then searched  
23 again prior to the tow truck arriving at the scene.  
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1 The vehicle was searched again at the police impound, and officers found  
2 several bags as well as a safe in the vehicle. As Mr. Kern was known to the officers,  
3 they requested a k-9 search of the vehicle. The K-9 search of the vehicle was done  
4 at the police impound lot. The dog did not alert on the presence of drugs when he  
5 was deployed to the vehicle.  
6

7 Officers, in support of the warrant request, alleged that as there had been  
8 reports of theft at construction sites and that it was 3:00 am when Mr. Kern was  
9 pulled over in a stolen vehicle, and that they knew that Mr. Kern had been convicted  
10 of burglary in the past. The officers also speculated that there might be identification  
11 documents and other ownership documents in the vehicle. Based on this  
12 information a warrant was obtained.  
13  
14

15 During the search, officers located a safe in the back of the vehicle as well as  
16 a pump rifle. The officers opened the safe with the keys that were taken from Mr.  
17 Kern at the time of his arrest. In the safe, they found a handgun, digital scale, and  
18 narcotics as well as another locked bag. The officers did not have a warrant to open  
19 the safe. After locating these items, the officer sought an amended search warrant.  
20

21 After the amended search warrant, the officers continued the search, as noted  
22 in the safe was a locked bag. Officers figured out the code to the bag and opened it.  
23 In the bag officers found additional controlled substances as well as U.S. currency.  
24  
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1 Again, the officers did not have a warrant to open the locked bag. The officers  
2 found additional controlled substances in the front passenger area.

3  
4 Mr. Kern was then charged in state court with weapons violations, controlled  
5 substance violations and possession of a stolen vehicle.

6 On July 21, 2022, Officer Klicker observed Mr. Kern walking between two  
7 vehicles on private property at 217 Prospect Ave., in Walla Walla. The officer was  
8 aware that Mr. Kern had a felony warrant outstanding. After confirming the warrant  
9 officers approached Mr. Kern and placed him under arrest and into a police vehicle.  
10 Officers then approached the Ford Mustang that was still running. As noted, the  
11 property was clearly private and had no trespass signs were clearly posted on the  
12 property. In examining the vehicle, officers observed a backpack as well as a black  
13 and silver case. The officer noted that the case was similar to the safe found on  
14 February 11, 2022.  
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17 At the scene, officers requested permission from the property owner to  
18 conduct a K-9 search of the vehicle on his property. The property owner denied  
19 consent. Based on this information as well as the fact that Mr. Kern had been  
20 charged with drug crimes in the past, the officers sought a warrant for entry onto the  
21 property and to conduct a K-9 search of the vehicle.  
22  
23

24 A K-9 search was conducted at the scene and the dog alerted to alleged  
25 narcotics. Officers then sought an amended search warrant and searched the vehicle.

1 The search of the vehicle occurred at the police impound. Officers located a grey  
2 backpack that had a semi-automatic handgun in it. They also found a large amount  
3 of narcotics in the backpack as well as a large amount of U.S. Currency. The officers  
4 then opened the silver case and found another handgun and ammunition. Officers  
5 did not have a search warrant to search the backpack or the silver case.  
6

7 Mr. Kern maintains that there was insufficient probable cause to support the  
8 request for a search warrant for either vehicle. He also maintains that the search of  
9 several locked containers in the vehicle on February 11, 2022, as well as the  
10 backpack and silver case on July 21, 2022, were in violation of the law. Mr. Kern  
11 further maintains that the warrants contained material misrepresentations and omissions  
12 that made the warrants defective. Mr. Kern would further request an  
13 evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) and  
14 *United States v. Ippolito*, 774 F.2d 1482 (9<sup>th</sup> Cir. 1985) This request is based on the  
15 files herein and the attached Memorandum of Law and attachments.  
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## 19 II. ARGUMENT

20 The Fourth Amendment to the United States Constitution states:

21 The right of the people to be secure in their persons, houses,  
22 papers, and effects, against unreasonable searches and seizures,  
23 shall not be violated an no warrants shall issue, but upon probable  
24 cause, supported by oath and affirmation, an particularly  
25 describing the place and the persons or things to be searched.

1 United States Constitution, Amend. IV. Evidence obtained as a result of searches  
2 conducted under the authority of warrants lacking in probable cause are excluded in  
3 the prosecution's case in chief. *Weeks v. United States*, 232 U.S. 383 (1914); *Murray*  
4 *v. United States*, 487 U.S. 533 (1988)(The exclusionary rule prohibits introduction  
5 into evidence of tangible material seized during an unlawful search ... and of  
6 testimony concerning knowledge acquired during an unlawful search.) The "good  
7 faith" exception to the traditional application of the exclusionary rule endorsed by  
8 the Supreme Court in *United States v. Leon*, is inapplicable here. This is so because  
9 the affidavit was utterly lacking in probable cause and further, the affidavit failed to  
10 include material information because of the affiant's misstatements or omissions  
11 which were either deliberately or recklessly made. *United States v. Leon*, 468 U.S.  
12 897 (1984); *Franks v. Delaware*, 438 U.S. 154 (1978).

16 A. THE FEBRUARY STOP WAS IN VIOLATION OF THE LAW.

17 *Rodriguez v. United States* held that “[a]n officer . . . may conduct certain  
18 unrelated checks during an otherwise lawful traffic stop. But . . . he may not  
19 do so in a way that prolongs the stop, absent the reasonable suspicion  
20 ordinarily demanded to justify detaining an individual.” 135 S. Ct. 1609,  
21 1615 (2015). See also *United States v. Landros*, 913 F.3d 862 (9<sup>th</sup> Cir. 2019)

24 In *Rodriguez*, the Supreme Court vacated the judgment on the basis that law  
25 enforcement may not extend a traffic stop with tasks unrelated to the traffic mission,

1 absent independent reasonable suspicion. *Rodriguez*, 135 S.Ct. at 1616-17. In  
2 reaching this conclusion, the Court made clear that it would not have mattered if the  
3 police officer conducted the dog sniff test before, rather than after, he issued the  
4 warning. What mattered was the added time, not at what point, in the chronology of  
5 the stop, that time was added. *Id.*

7 In *United States v. Evans*, 786 F.3d 779,(9th Cir. 2015) published a month  
8 after *Rodriguez*, The court held that law enforcement impermissibly extended a  
9 traffic stop by running an ex-felon registration check unrelated to traffic safety and  
10 unsupported by separate reasonable suspicion. *Id.* "That the ex-felon registration  
11 check occurred before ... the officer issued a ticket [stemming from the initial traffic  
12 violation] is immaterial," we explained. *Id.* (brackets, citation, and internal quotation  
13 marks omitted). "[R]ather, the critical question is whether the check prolongs  
14 — *i.e.*, adds time to — the stop." *Id.* See also, *United States v. Landros*, 913 F.3d  
15 862, 867 (9<sup>th</sup> Cir. 2019)

18 Mr. Kern maintains that the stop was impermissible and exceeded the time  
19 necessary to handle the matter. First, Mr. Kern maintains there was no probable  
20 cause to perform a check of the vehicle registration as the vehicle had not violated  
21 the law. Second, after the officer ran the plates and was informed that the vehicle  
22 was stolen, the purpose of the stop was to stop the vehicle and determine if it was  
23 stolen. When the officer stopped the vehicle and then removed Mr. Kern from the  
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1 vehicle and arrested him, there was no further need to conduct a search. Therefore,  
2 the continued search of the vehicle was in violation of the law.

3  
4 B. THERE WERE INSUFFICIENT FACTS TO SUPPORT PROBABLE  
5 CAUSE FOR THE SEARCH WARRANT FOR EITHER VEHICLE.

6 A judge's determination of probable cause is not reviewed de novo but is  
7 afforded great deference. *Illinois v. Gates*, 462 U.S. 213, 236, *reh'g denied*, 463 U.S.  
8 1237 (1983) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969); *United*  
9 *States v. Alexander*, 761 F.2d 1294, 1300 (9th Cir. 1985). "In close cases the Court  
10 should give preference to the validity of the search warrant." *United States v.*  
11 *Holzman*, 871 F.2d 1496, 1511 (9th Cir. 1989).

12  
13 "However, the magistrate [judge] must have a substantial basis" for  
14 determining that probable cause exists. *United States v. Ramos*, 923 F.2d 1346, 1351,  
15 n. 9 (9th Cir. 1991); *United States v. Holzman*, 871 F.2d 1496, 1511 (9th Cir.1989).  
16 Stated differently, a magistrate must have a substantial basis for concluding that the  
17 "property which is the object of the search is probably on the premises to be searched  
18 at the time the warrant is issued." *United States v. Hendricks*, 743 F.2d 653, 654 (9th  
19 Cir. 1984); See also, *Illinois v. Gates*, 462 U.S. 213, 239 (1983)("An affidavit must  
20 provide the magistrate with a substantial basis for determining the existence of  
21 probable cause, and wholly conclusory statement[s] fail to meet this requirement  
22 sufficient information must be presented to the magistrate to allow that official to  
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1 determine probable cause; his actions cannot be a mere ratification of the bare  
2 conclusions of others.")

3  
4 A warrant's validity is tested for probable cause based on the information  
5 available to the officers preparing the affidavit and warrant. *Maryland v. Garrison*,  
6 480 U.S. 79, 85 (1987)("the validity of the warrant must be assessed on the basis of  
7 the information that the officers disclosed, or had a duty to discover and disclose, to  
8 the issuing Magistrate [judge].")

9  
10 The warrant applicant's knowledge is tested under the totality of the  
11 circumstances. *Illinois v. Gates*, 462 U.S. at 238. All facts to support a finding of  
12 probable cause to issue a warrant "must be contained within the four corners of the  
13 affidavit given under oath." *United States v. Stanert*, 762 F.2d 775, 778, amended in  
14 nonrelevant part and reh'g denied, 769 F.2d 1410 (9th Cir. 1985).

15  
16 In reviewing the affidavits in support of the warrants, they are full of  
17 conclusionary language and lack any facts sufficient to establish probable cause.

18  
19 As for the February 2022 search, the officers determined that the vehicle was  
20 stolen, and Mr. Kern was arrested for that crime. There was no need to conduct a  
21 further search of the vehicle. As for the allegation that the nail gun in front seat  
22 supported probable cause, there is nothing that links the nail gun to being stolen or  
23 a theft. Additionally, it was mere speculation that the officers would locate  
24 identification documents or false documents as indicated in the warrant affidavit. The  
25

1 warrant lack particularity regarding what the officers were searching for in relation  
2 to a crime. As such the warrant was invalid.

3  
4 As to the July 2022 search, again the officers did not have probable cause to  
5 seek a search warrant. On July 21, 2022, officers observed Mr. Kern and arrested  
6 him on an outstanding warrant. After securing him in the back of a patrol car, the  
7 officers asked the property owner for consent to enter the property and seek a K-9  
8 search. The owner of the property denied consent. The officers then sought the  
9 warrant. They based the warrant request on observing a backpack in the vehicle with  
10 drug paraphanlia in it. It is not described in the warrant how the offficers oberved  
11 these items without entering the vehicle. Additionally, officers concluded that due  
12 to Mr. Kernn having brass knuckles, this also established the need to search the  
13 vehicle. These facts did not support the speculation that a drug crime was somehow  
14 involved or occurred prior to the K-9 search. After the K-9 alerated, the officers  
15 towed the vehicle to the police impound.

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19 At the police impound, officers secured another warrant and serached the  
20 vehicle. They opened the silver container and located a wepon. They also opened a  
21 backpack and found narcotics and a weapon. There were no facts sufficent to  
22 support the warrant. The fact that the silver box was similar to the safe from the July  
23 2022 search was not sufficent.

1 These statements by the officer were mere conclusions and speculations that  
2 Mr. Kern was engaged in criminal activity. There are no facts that support these  
3 conclusions. Thus, the warrants lacked probable cause.  
4

5 Clearly, given the facts of the searches, there were insufficient facts to support  
6 a finding of probable cause. Therefore, the evidence seized must be suppressed.

7 C. THERE WERE MISREPRESENTATIONS ANDS OMISSIONS  
8 THAT WERE PURPOSEFULLY OR RECKLESSLY MISLEADING  
9 THUS INVALIDATING THE AFFIDAVIT IN SUPPORT OF THE  
10 SEARCH WARRANT FOR BOTH VEHICLES.

11 The inquiry of a warrant applicant is "whether a reasonably well-trained  
12 officer in [the applicant]'s position would have known that his affidavit failed to  
13 establish probable cause and that he should not have applied for the warrant. If such  
14 was not the case, the officer's application for a warrant was not objectively  
15 reasonable..." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). [S]uppression is  
16 appropriate only if the officers were dishonest or reckless in preparing their affidavit  
17 or could not have harbored an objectively reasonable belief in the existence of  
18 probable cause." *United States v. Leon*, 468 U.S. 897, 926, reh'g denied, 468 U.S.  
19 1250 (1984). In this case, the warrant applicant was either purposefully or recklessly  
20 misleading regarding the facts that supported probable cause.  
21

22 To prevail on a claim that the police procured a warrant through deception,  
23 the party challenging the warrant must show that the affiant deliberately or recklessly  
24 made false statements or omissions that were material to the finding of probable  
25

1 cause. *See Ewing v. City of Stockton*, 588 F.3d 1218, 1223 (9th Cir. 2009). Our  
2 evaluation of materiality requires that we consider the effect of any false statements  
3 or omissions. " If an officer submitted false statements, the court purges those  
4 statements and determines whether what is left justifies issuance of the warrant." *Id.*  
5 at 1224. " If the officer omitted facts required to prevent technically true statements  
6 in the affidavit from being misleading, the court determines whether the affidavit,  
7 once corrected and supplemented, establishes probable cause." *Id.* " If probable  
8 cause remains after amendment, then no constitutional error has occurred." *Bravo v.*  
9 *City of Santa Maria*, 665 F.3d 1076, 1084 (9th Cir. 2011).

12 Mr. Kern maintains that there are numerous omissions and misstatements in  
13 the warrant request. In the search warrant on July 21, 2022, there is no mention that  
14 the property owner denied consent to search the vehicle. Additionally, officers did  
15 not identify what the arrest warrant was for in arresting Mr. Kern.

17 As for the February search of the vehicle, the officer states he believes there  
18 will be narcotics in the vehicle, he does not state why he believes there would be  
19 drugs in the vehicle. The officer states in the affidavit that he was investigating  
20 possession of a stolen vehicle, not investigation of drug trafficking. Additionally, he  
21 states that there were thefts at construction sites, however he does not give dates or  
22 locations of these construction sites.  
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1 These omissions and misstatements were used to mislead the Judge in the  
2 issuance of the warrants for the search of the vehicles and thus the search and  
3 evidence seized were in violation of the law.  
4

5 D. OFFICERS SEARCH OF THE LOCKED AND CLOSED  
6 CONTAINERS IN THE VEHICLES WAS IN VIOLATION OF THE  
7 LAW

8 As noted herein, in both the February and July searches of the vehicles,  
9 officers unlocked closed containers. At the time that they searched the containers  
10 they did not have a search warrant, nor did they have consent.

11 Mr. Kern maintains that the officers were required to get a search warrant for  
12 the locked items and backpack in the vehicles. A defendant's expectation of privacy  
13 in the closed, opaque containers raises a duty to seek a search warrant from a neutral  
14 judge or magistrate. *See United States v. Chadwick*, 432 U.S. 1 (1977); *Texas v.*  
15 *Brown*, 460 U.S. 730, 750, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983) (Stevens, J.,  
16 concurring). *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 1656, 80 L.  
17 Ed. 2d 85 (1984) ( agents must obtain warrant before examining contents of package  
18 even though they may lawfully seize it to prevent its loss or destruction); *United*  
19 *States v. Licata*, 761 F.2d 537, 544 (9th Cir. 1985) (same). *See generally Sequera v.*  
20 *United States*, 468 U.S. 796, 104 S. Ct. 3380, 3387, 82 L. Ed. 2d 599 (1984)  
21 (discussing different interests implicated by searches and seizures).  
22  
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1 Here there is no indication that the officers sought a search warrant when they  
2 opened the safe in the February 2022 search. In addition, they did not seek a search  
3 warrant in the July 2022 search for the backpack or the locked case in the vehicle.  
4 Nor is there any indication that they sought consent to search any of these items.  
5 Therefore, the search of the locked boxes was in violation of the law and the  
6 evidence seized from it must be excluded.  
7

8  
9 Finally, as the February 2022 search was a violation of the law, and  
10 information from that search was used in the July 2022 search warrant, therefore, all  
11 of the evidence seized from the July 22 search is inadmissible. Evidence deriving  
12 from an illegal investigation is generally considered tainted by the illegality and thus  
13 inadmissible, notwithstanding the suspect's consent, unless subsequent events have  
14 purged the taint. *Wong Sun v. United States*, 371 U.S. 471, 491, 9 L. Ed. 2d 441, 83  
15 S. Ct. 407 (1963); *United States v. Morales*, 972 F.2d 1007, 1010 (9th Cir. 1992).  
16 *United States v. Bradley*, 219 F. Supp. 2d 1150, 1156 (D. Or. 2002) The Motion  
17 should be granted.  
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III. CONCLUSION

The defendant respectfully requests that the court suppress all evidence obtained as a result of the searches conducted pursuant to the warrants issued in this case. Alternatively, the defendant requests that the Court conduct a hearing on this motion to suppress pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).

Dated this 29<sup>th</sup> day of June 2023.

Respectfully Submitted,

*S/Nicholas Marchi*  
CARNEY & MARCHI

**CERTIFICATE OF SERVICE**

I certify that a copy of the Motion and Memorandum RE: Suppression of Evidence was e-mailed via ECF on 6/29/2023, to S. Van Marter, Assistant United States Attorney, 402 E. Yakima, Suite 210, Yakima, WA 98901.

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